reservation. *Burns* v. *Gallagher,* 62 Md. 462; *Outerbridge* v. *Phelps,* 58 How. Prac. 77; *Wells* v. *Garbutt,* 132 N. Y. 430; *Covell* v. *Bright,* 157 Mich. 419, 122 N. W. 101; JONES ON EASEMENTS, § 136.

The recent case of *Powers* v. *Heffernan,* 233 Ill. 597, inclines toward the position that there is no distinction between the requisites necessary for the creation of an easement of implied grant and of implied reservation. It allowed the implied reservation, under the facts of the case, although there was no *strict* necessity, thus showing a tendency toward liberal rather than strict construction of the doctrine. It does not express itself on the degree of necessity required, leaving the matter more or less open in Illinois.

The Supreme Court of Michigan, in the recent case of *Brown* v. *Fuller,* (1911), — Mich. —, 130 N. W. 621, adheres to the doctrine of strict necessity, in pursuance of the prior decisions of that court. Two justices, however, dissented. They agreed on the strict necessity rule, but differed as to what constituted a strict necessity. In view of the repeated decisions on the subject, it would seem that the dissenting justices are attempting to set up the reasonable necessity rule under another name.

For a discussion of the subject, with special reference to the case of *Powers* v. *Heffernan,* supra, see 3 ILL. L. REV. 187. H. L. B.

EXTENT OF THE CITY'S RIGHT, UNDER THE POWER OF EMINENT DOMAIN, TO EXEMPTION FROM LIABILITY FOR CONSEQUENTIAL DAMAGES UNDER THE RULE OF DAMNUM ABSQUE INJURIA.—The constitution of New York, Art. 1, Sec. 6, prohibits "the taking of private property for public use without just compensation." As originally interpreted, redress under this clause was limited to cases of *actual taking* of property. So that when no property was taken, no matter how much injury was inflicted, there could be no recovery for it. The leading case under the provision as stated, is *Radcliff's Executors* v. *The Mayor,* (1850), 4 N. Y. 195. The court says, "The plaintiff does not allege that any part of her land *was taken* for the street or avenue; but one portion of the complaint is that she was injured by making the street and avenue on land which bounded two sides of her lot." The injury was held to be *consequential* and not direct and so damnum absque injuria. This term consequential has since been applied to damages so excluded. As consequential damages are allowed in tort and contract actions, but are excluded in actions for injuries caused by acts under the power of eminent domain, they must constitute a separate class, and this meaning must be kept in mind in dealing with this class of cases.

A decision recently handed down by the Supreme Court of New York, Appellate Division, found the plaintiff entitled to substantial damages. In this case, *Ogden et al.* v. *City of New York,* (1910), 126 N. Y. Supp. 189, the plaintiff was owner of property abutting on a street in which excavations were made by the city for the purpose of constructing municipal docks. There was no negligence, but the land caved in on the plaintiff's premises 20 to 30 feet, the street was blocked for two years, and a high board fence was built on the plaintiff's premises to protect the public from the excavation.

The prevailing opinion was based entirely on a recent New York decision of the Court of Appeals under the Rapid Transit Acts, L. 1894, ch. 4, and acts amendatory thereof. This case, *Matter of the Board of Rapid Transit R. Com'rs*, 197 N. Y. 81, 90 N. E. 456, held the city liable to abutting property owners for damages to their easement in the street, and for physical injuries to buildings caused by excavations in the street, ruling that the city in building the subway, was not engaged in improving the street for street purposes, but was engaged in railroad business, just as a private concern, with a chance of making or losing money. (See also *Coy* v. *Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535.) They based the right of an adjoining owner to recover, not on his ownership of the fee of the street, but on the fact that he was an "abutting owner." "The mere abutter, by virtue of the Rapid Transit Acts, the situation of his premises (*Kane* v. *N. Y. Elev. R. R. Co.*, 125 N. Y. 164, 180) and proximity to the street (*Bohm* v. *Metr. Elv. Ry. Co.*, 129 N. Y. 576, 587), has easements and rights in the streets which are property entitled to the protection of the law. He is therefore entitled to lateral support and freedom from physical interference with his abutting property." The injuries in this case were such as seriously and permanently to injure the buildings on the adjoining premises, but the commercial character of the work, and the statute, were the basis of the decision. VANN, J., says, "If the use were for a street purpose, the city would not be liable for damages caused by proper construction in a case where it took no land." The Supreme Court likens the docks to the subway. The city is to receive rent or dockage charges, just as it receives rent for other municipal property. That there is no special statutory arrangement for compensation of the abutting owners as in the Rapid Transit cases, is not controverted by the prevailing opinion, but the remainder of VANN, J.'s statement about right of easement, proximity to the street, and situation of premises, is made the basis of the decision.

The dissenting opinion is based on precedent as stated in the leading case and followed practically unanimously in the state. The opinion says, "In the present record plaintiff has proved nothing more than consequential damages, the direct and necessary result of the work properly done in furtherance and execution of public improvement." It claims that the case of 197 N. Y. 81 is not applicable on the facts, and the restoration of the street, of the lateral support, and of the premises, all unchanged and without additional burden in the shape of a railroad or other non-street use supports this view. Futhermore the docks, wharves, piers, and bulkheads are declared a part of the public highways and devoted to public use. This view would remand the plaintiff to an action at law for such damages as he could get for the trespass in putting a fence on his land. In *Moore* v. *City of Albany*, 98 N. Y. 396, the court said, "If in excavating with proper care within the street line, the adjoining soil had fallen into the street, its owners would have no legal cause of complaint." This is following the decision of *Wilson* v. *Mayor of New York*, 1 Denio 595, 43 Am. Dec. 719, in which plaintiff's property had caved into an excavation caused by grading a street past it. The court held this was not taking the plaintiff's property for public use within the meaning of the constitution. In *Uppington* v. *City of New York*, 165 N. Y. 222, 59

N. E. 91, 53 L. R. A. 550, the city was not held liable for settling of the ground in the street in front of the plaintiff's premises due to construction of a sewer. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 641, supports the dissenting opinion although decided with a stricter constitutional provision of the state of Illinois taken into consideration. In that case the plaintiff claimed that the defendant city, in building a tunnel, had damaged it by preventing access to its docks from the river, to its buildings from the street, and had injured its buildings by its excavations. Mr. Justice STRONG, delivering the opinion, said, "The remedy, therefore, for a consequential injury resulting from the State's action through its agent's (the city), if there be any remedy, must be that and that only which the legislature shall give. It does not exist at common law. * * * It is immaterial whether the fee in the street is in the State or in the City or in the adjoining lot-owner; if in the latter the State has an easement to repair and improve." He cites the Supreme Court of Illinois in a decision that such an incidental inconvenience was not a taking or damaging of property under the revised constitution of Illinois of 1870, which reads, "private property shall not be taken or damaged for public use" without compensation, etc. *Chicago* v. *Rumsey,* 87 Ill. 348, 10 CHIC. L. N., 333.

The holding in the principal case, to say the least, is against the general trend of decisions in New York, and against the common law rule as ably set forth by Mr. Justice STRONG, supra. The extension of the decision under the Rapid Transit Acts to cover improvement of docks and wharves would not seem to be supported on the mere fact that dockage charges might be levied on users. To grant that the abutting owner, if deprived of access during the improvement of the street, has had his property taken from him under the constitution, will give an action for substantial damages where consequential damages have heretofore been excluded. There is no remedy at common law, yet this decision would remove the necessity for statutory provision. The only argument outside of the portion of the Rapid Transit Case cited, is that wharves and docks are not streets and highways. It would seem that they are in general and that in this case there was an improvement of the street. The Elevated Railway cases in New York gave adjoining property owners easements of light, air, and access, and these may have in some measure influenced the court. But it does not seem that the right to substantial damages can follow from the results of street improvements, merely because there is a combination of easement, situation of premises, and proximity, without statutory provision for compensation. C. E. C.